

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLEES

United States Court of Appeals
for the District of Columbia Circuit

Nos. 11,287-8

MARY M. RILEY, *Appellant*

v.

ERWIN M. RITZ, MARION PEACH, DONALD HOFFMAN, FRED-
RICK K. BULL, *Appellees*

Appeal From the United States District Court for the
District of Columbia

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QUESTIONS PRESENTED

1. Can an action for libel be maintained in the District Court of the United States for the District of Columbia against persons who have been served with process in the State of New York and the State of Maryland?

2. Is a government employee personally liable for statements made in the course of his official duties?

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BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

This is an appeal from an order of the District Court for the District of Columbia dismissing a complaint filed in that court by appellant. (Civil Action No. 3993-51) In the complaint, it was alleged that certain libelous and misrepresentative statements concerning appellant were written by appellees and that these statements had caused her to lose her employment in the government. Appellant asked the court to compel appellees to withdraw these statements and also to compensate her for the damage that she had suffered as a result of their publication. However, three appellees filed motions to dismiss on the ground that

the court lacked jurisdiction over them due to improper venue and insufficient service, and the remaining appellee filed a motion to dismiss on the ground that the complaint failed to state a cause of action against him. The court granted the motions and the complaint was dismissed.

In the complaint it is alleged that appellant at one time was employed as a civilian Cost Analyst, GS-9, at Headquarters, AACS, Andrews Field, Washington, D. C., and that her superiors and co-workers at such office, which is located in the state of Maryland, included: (1) appellee Erwin M. Ritz, Chief, Cost Analysis Branch, Management Analysis Division, a civilian; (2) appellee Marion Peach, Captain, U.S.A.F., Chief, Management Analysis Division, Comptroller's Office; (3) appellee Donald Hoffman, a member of the military service; and (4) appellee Fredrick K. Bull, also a member of the military service (J.A. 1-6). It is further claimed that the alleged libelous and misrepresentative statements were written and published by such appellees in such office (J.A. 1-2, 3-6).

In her complaint, appellant stated that, at the time the complaint was filed, the duty station of appellee Peach was: Detachment #10, AF, ROTC, Colgate University, Hamilton, New York, and that the duty station of appellee Hoffman was: HQ, AACA, Andrews Field, Washington 25, D. C. Appellant stated that she did not know the resident address of either appellee Peach or appellee Hoffman.

Appellant further stated that the resident address of appellee Bull was: 6206 Ritchie Road, Forrestville, Maryland, and that the resident address of appellee Ritz was: 2816 Erie Street, S.E., Washington, D. C. She gave the duty address of both appellee Bull and appellee Ritz as: HQ, AACS, Andrews Field, Washington 25, D. C.

The record indicates that appellee Peach was served with process in the State of New York and that appellees Hoffman and Bull were served in the State of Maryland. These three appellees entered special appearances in the case in order to file motions to dismiss on the grounds of (1) improper venue, and (2) insufficiency of service (J.A. 8-9). They maintained that appellant had failed to allege that

they were residents or inhabitants of the District of Columbia and that the returns of service indicate that they were served outside the District.

Appellee Ritz entered a motion to dismiss the complaint on the ground that it failed to state a cause of action (J.A. 7). He maintained that, whether the allegedly libelous writing was defamatory or not, he enjoys an absolute immunity from personal civil liability because such writing was made in the course of his official duties as a government employee.

The District Court granted the respective motions of the appellees and from the orders dismissing the action (J.A. 11-12), appellant now brings this appeal.

STATUTES INVOLVED

Title 11, D. C. Code (1940), section 306, provides:

Said Court (except as otherwise provided in this title) shall have cognizance of all crimes and offenses committed within said district and of all cases in law and equity between parties, both or either of which shall be resident or be found within said district and also of all actions or suits of a civil nature at common law or in equity, in which the United States shall be plaintiffs or complainants; and of all seizures on land or water, and all penalties and forfeitures made arising or accruing under the laws of the United States.

Title 11, D. C. Code (1940), section 308, provides:

No action or suit shall be brought in the District Court of the United States for the District of Columbia by original process against any person who shall not be an inhabitant of, or found within, the District, except as otherwise specially provided.

Title 11, D. C. Code (1940), section 108, provides:

Publication may be substituted for personal service of process upon any defendant who can not be found and who is shown by affidavit to be a nonresident, or

to have been absent from the District for at least six months, or against the unknown heirs or devisees of deceased persons, in suits for partition, divorce, by attachment, foreclosure of mortgages and deeds of trust, the establishment of title to real estate by possession, the enforcement of mechanics' liens, and all other liens against real or personal property within the District, and in all actions at law and in equity which have for their immediate object the enforcement or establishment of any lawful right, claim, or demand to or against any real or personal property within the jurisdiction of the court.

Personal service of process may be made by any person not a party to or otherwise interested in the subject-matter in controversy on a nonresident defendant out of the District of Columbia, which service shall have the same effect and no other as an order of publication duly executed. In such case the return must be made under oath in the District of Columbia, unless the person making the service be a sheriff or deputy sheriff, a marshal or deputy marshal, authorized to serve process where service is made, and such return must show the time and place of such service and that the defendant so served is a nonresident of the District of Columbia. The cost and expense of such service of process out of the District of Columbia shall be borne by the party at whose instance the same is made and shall not be taxed as a part of the costs in the case; but where such service of process is made by same authorized officer of the law in this section mentioned, the actual and usual cost of such service of process shall be taxed as a part of the costs in the case.

SUMMARY OF ARGUMENT

Appellant contends that appellees Bull, Hoffman and Peach were properly served with process in this case. However, in an action for libel in the District Court for the District of Columbia, the defendants must be inhabitants of, or found within, the District of Columbia. Inasmuch

as these three appellees were not and are not inhabitants of the District, and they were served with process in other jurisdictions, the District Court was correct in dismissing the complaint for lack of jurisdiction.

Although appellee Ritz was properly served, the complaint against him must also be dismissed. Contrary to the contentions of appellant, a statement made by a government employee pursuant to the course of his official duties, whether it is defamatory or not, enjoys an absolute immunity from personal liability.

ARGUMENT

I

The District Court Was Correct in Dismissing the Claims Against Appellees Peach, Hoffman and Bull for Want of Jurisdiction Because They Were Not Inhabitants of the District of Columbia and They Were Not Personally Served With Process Within the District.

Appellant has brought an action against appellees for libel and misrepresentation in the District Court for the District of Columbia as a court of general jurisdiction. The judicial powers of the District Court has been defined in *Fehlhaber Pile Co., Inc. v. Tennessee Valley Authority*, (1946) 81 App. D.C. 124, 155 F. 2d 864, where this Court said (81 App. D.C. at 125):

As we have often pointed out, the District Court of the United States for the District of Columbia is both a federal district court and the local trial court of general jurisdiction. As the former, it is governed by national legislation respecting venue, jurisdiction, procedure and the like, embodied in the United States Code. As the latter, it is governed by local legislation embodied in the District of Columbia Code. * * *

An action for libel is *in personam* in nature. Hence, when the appellees entered a special appearance in this case in order to contest the venue of the action and the jurisdiction of the court, the District Court, sitting as a court of general jurisdiction, was compelled to review the

sections of the District of Columbia Code which pertain to *in personam* actions.

Title 11, District of Columbia Code (1940) § 308 provides that:

No action or suit shall be brought in the District Court of the United States for the District of Columbia by original process against any person who shall not be an inhabitant of, or found within, the District, except as otherwise specially provided.

The provisions of this section of the Code have been construed by this Court in *King v. Wall & Beaver Street Corporation*, (1944) 79 App. D.C. 234, 145 F. 2d 377. In the *King* case the plaintiffs, stockholders of Munson Line, Incorporated, a Maryland corporation, brought an action against the president of such corporation and his wife. Munson Line was joined as a party defendant and was served in Maryland. This Court reversed the lower court, dismissed the complaint against Munson Line and granted the motion of the president for a summary judgment, saying, *inter alia* (79 App. D.C. 234 at 236):

It is true, as we have seen, that the District Court of the United States for the District of Columbia may exercise jurisdiction if defendants are found within the District, but it is also true that under the provisions of the local statutes, process of the District Court may not issue or be served on any person not an inhabitant of or found within the District. Code, 1950, § 11-308. Clearly, therefore, there is no local jurisdiction by which the Munson Line, an indispensable party, as we have seen, may be brought into this litigation.

The complaint that was filed in this action clearly failed to state that appellees Bull, Hoffman and Peach were inhabitants or residents of the District of Columbia. Nor were they found in the District because the returns of

service indicate that appellee Peach was served in the State of New York and that appellees Bull and Hoffman were served in the State of Maryland. Therefore, the venue in this *in personam* action is improper and the District Court did not have jurisdiction over the persons of the appellees.

Service of process on these three appellees was made in accordance with Title 13, District of Columbia Code (1940) § 108, which reads in part as follows:

Personal service of process may be made by any person not a party to or otherwise interested in the subject-matter in controversy on a nonresident defendant out of the District of Columbia, which service shall have the same effect and no other as an order of publication duly executed. * * *

Such provision, as this Court said in *Gaines v. Gaines*, (1946) 81 App. D.C. 260, 157 F. 2d 521, applies solely to certain enumerated actions *in rem* and not to *in personam* actions. The Court, in construing such section in the *Gaines* case, said (81 App. D.C. at 261):

* * * * *

The latter section (§ 108) sets up, in two literary paragraphs, two separate methods of bringing a non-resident defendant before the court in certain enumerated proceedings *in rem* * * *. The substitution of publication for personal service of process, under certain specified conditions, is authorized in the first paragraph * * * and in the second paragraph, it is provided that personal service on a non-resident may be made out of the District of Columbia * * *. The statute gives to such personal service the same effect and no other, as an order of publication duly executed. There is no relation between the two literary paragraphs of § 108 except that they deal with the common subject of providing a method to obtain jurisdiction over a non-resident for the purpose of entering judgment in a proceeding *in rem*, and except that the per-

sonal service method shall have exactly the same effect as the publication method. (parenthesis added) * * *

Therefore, the venue in this action is improper, the District Court lacked jurisdiction over the persons of appellees Bull, Hoffman and Peach because the executed service of process on each of them was not authorized by law. The appellees chose to contest these irregularities by motion under Rule 12 (b) of the Federal Rules of Civil Procedure.¹ Such procedure is proper² and the District Court could take no action other than to dismiss the complaint.

II

The District Court Was Not in Error in Dismissing the Complaint Against Appellee Ritz for Failure to State a Cause of Action Because Appellee Ritz is a Government Employee and, as Such, Is Not Personally Liable for Actions Taken in Accordance With His Official Duties.

Appellant, who was formerly employed as a government Cost Analyst at Andrews Field, has also brought this action for libel against appellee Ritz, the Chief of the Cost Analysis Branch of the Management Analysis Division at such air field. The action is based on a letter which appellee Ritz wrote, as part of his official duties, to appellee Peach, the then Chief of the Management Analysis Division. It appears, therefore, on the face of the complaint, together with the attached exhibits and the record of the case, that the so-called libel was published by the immediate superior of appellant in a letter to the head of the division in which

¹ Rule 12 (b), F.R.C.P., provides in part:

* * * Every defense * * * shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process * * *.

² See *Blackman v. Guerre*, No. 361, decided March 3, 1952, in the United States Supreme Court.

both appellant and appellee Ritz were employed. The communication is one which was made in relation to a matter entrusted to appellee Ritz as appellant's superior and in the course of his official duties. Accordingly, whether it is defamatory or not, such communication enjoys an absolute immunity.

The proposition that a government official is not civilly responsible for injuries caused by actions taken in the performance of his duties, even though his conduct may be motivated by malice or other improper reason, has long been established. A leading Supreme Court case on the subject is *Spalding v. Vilas*, (1896), 161 U.S. 483. There, the Postmaster General was sued for libel in connection with a statement made to clients of the plaintiff. The court, after reasoning that public officials should not be subjected to constant suits and the government should not be deprived of the free exercise of the discretion of its officers in the performance of their official duties, held that the statement of the Postmaster General, regardless of its defamatory nature, was written in connection with his official duties and therefore enjoyed an absolute privilege and said (161 U.S. at 498):

We are of opinion that the same general consideration of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of Executive Departments when engaged in the discharge of duties imposed upon them by law. The interests of the people require that due protection be accorded to them in respect to their official acts. As in the case of a judicial officer, we recognize a distinction between action taken by the head of a Department in reference to matters which are manifestly or palpably beyond his authority, and action having more or less connection with the general matters committed by law to his control or super-

vision. . . In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint. * * *

Appellant contends that appellee Ritz is an "employee" and not a "government official" and that, therefore, cannot enjoy the immunity to which he asserts a claim. Such an argument was made in *United States v. Brunswick*, (1934) 63 App. D.C. 65, 69 F. 2d 383. This Court rejected the argument and held that the proper rule is stated in *De Arnaud v. Ainsworth*, (1904) 24 App. D.C. 167.

In the *De Arnaud* decision, which is the leading case on this question in this jurisdiction, the defendant, as Chief of the Record and Pension Office, made a report to the Secretary of War upon an application by plaintiff for a medal of honor. The plaintiff claimed that the report was derogatory and sued for libel. In upholding the defense that the report was privileged, this Court stated (24 App. D.C. at 178 and 181):

* * * Public policy affords absolute protection and immunity for what may be said or written by an officer in his official report or communication to a superior, when such report or communication is made in the course and discharge of official duty. Otherwise the perfect freedom which ought to exist in discharge of public duty might be seriously restrained and often to the detriment of the public service. Of course, when a party steps aside from duty and introduces into his report or communication defamatory matter wholly irrelevant and foreign to the subject of inquiry, a different question is presented. * * * It is, therefore, not the particular position of the party making the

report or communication that entitles it to absolute privilege, so much as the occasion of making it and the reasons of public policy for the immunity. * * *

The doctrines set out in the *De Arnaud* case, *supra*, have been extended in other decisions in this jurisdiction. The subject matter in *Farr v. Valentine*, (1912), 38 App. D.C. 413, was a letter from the Commissioner of Indian Affairs to the Secretary of the Interior, recommending the dismissal of the plaintiff, on employees of the Indian Bureau, on the ground of his unfitness for the position. There, this Court said (38 App. D.C. at 420):

The defendant, as Commissioner, was without authority to remove the plaintiff. It was in the line of his duty, however, to make recommendation to that end to his superior, the Secretary. The letter forming the basis of the first count was obviously written in the line of his duty. The occasion, therefore, was privileged. Everything in this letter is relevant to the point upon which is it centered—the unfitness of the plaintiff for the position occupied by him.

In *Smith v. O'Brien*, (1937), 66 App. D.C. 387, 88 F. ed 679, the Chairman of the Tariff Commission was sued for libel on the basis of allegedly slanderous statements made with regard to the reinstatement of the plaintiff, a matter which was then pending before the Tariff Commission. It therefore appeared that the communication was made in the course of the plaintiff's official duties and this Court, in affirming the dismissal of the suit, said (66 App. D.C. 388)

The instant occurred in defendant's office, and at the place where he met persons having business with the Commission. The Commission is a government agency vested with executive and quasi-judicial powers. It is invested with all the functions of authority which protect its members from liabilities or statements made in connection with the transaction of the business of

the Commission. Being so protected, we think the defendant should not be held liable in damages for the statements alleged to have been made. This clearly appearing from the opening statement of counsel, it was the duty of the court, upon motion, to direct the jury to return a verdict in favor of the defendant.

This Court has extended the doctrine of immunity to cover press releases made by the Secretary of the Interior. In *Glass v. Ickes* (1940) 73 App. D.C. 3, 117 F. 2d 273, *cert. denied* 311 U.S. 718, it was said (73 App. D.C. at 7):

Some contention is made by the appellant that the privilege applies only to communications between government officials, and not to those from an official to the general public. No such limitation is justified by the language of the Supreme Court in the *Villas* case nor has this court recognized such a distinction.

Appellant also contends that appellee Ritz was acting out of personal and improper motives when he made the statements here in issue. Such contentions were specifically repudiated by this Court in the *De Arnaud* case, *supra*, at page 178, and should be given no merit in this case.

Appellant further contends that appellee Ritz was not acting within the scope of his official duties when he wrote the letter here involved to his immediate superior. However, the scope of the executive function has been given a broad interpretation, even though the courts uniformly restrict the privilege of absolute immunity to communications relative to the duties involved. This Court has stated, in *Cooper v. O'Conner* (1938) 69 App. D.C. 100 at 104, 99 F. 2d 135, that:

* * * It is not necessary—in order that acts may be done within the scope of official authority—that they should be prescribed by statute; or even that they

³ See also: *Mellon v. Brewer*, (1927) 57 App. D.C. 126 at 129, 18 F. 2d 168, *cert. denied* 275 U.S. 530.

should be specifically directed or requested by a superior officer. It is sufficient if they are done by an officer "in relation" to matters committed by law to his control or supervision; or if they have "more or less connection with the general matters committed by law to his control or supervision"; or that they are governed by a lawful requirement of the department under whose authority the officer is acting.

The communication complained of was made as the performance of an important public service. No public communication of its contents has been made. Rather, it has been communicated in confidence to the superiors of both appellee Ritz and appellant in the government. These government superiors must be able to rely upon the character of this report, and others like it, in order that they may fully and accurately carry out their duties and responsibilities.⁴

It has been noted that appellant objects to the fact that the United States Attorney for the District of Columbia represented the appellees in the court below and now represents them in this appeal. There is nothing unusual about such procedure. Pursuant to the terms of Title 28, U.S.C. § 507, the Attorney General is charged with the responsibility to "direct all United States Attorneys . . . in the discharge of their respective duties." The Attorney General has directed that United States Attorneys, upon request, afford counsel and representation to government employees who are sued civilly as a result of their official duties. *Circular No. 4172*, dated May 11, 1950. In the instant case, the Attorney General, upon receipt of a formal request from the Department of the Air Force, authorized the local United States Attorney to appear on behalf of the appellees.

⁴ *Brown v. Rudolph* (1928) 58 App. D.C. 116, 25 F. 2d 540, *cert. denied* 277 U.S. 605; *Standard Nut Margarine Co. v. Mellon* (1934) 63 App. D.C. 339, 72 F. 2d 577, *cert. denied* 293 U.S. 605; *Lang v. Wood* (1937) 67 App. D.C. 287, 92 F. 2d 211.

CONCLUSION

Wherefore, it is respectfully submitted that the orders of the District Court should be affirmed.

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